

No. 1-12-3059

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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AMBROSINA G. SERRANO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 L5 1397
	)	
ILLINOIS DEPARTMENT OF	)	
EMPLOYMENT SECURITY; DIRECTOR	)	
OF THE ILLINOIS DEPARTMENT OF	)	
EMPLOYMENT SECURITY; and	)	
BOARD OF REVIEW,	)	
	)	
Defendants-Appellants.	)	
	)	
and	)	Honorable
ALDI, INC. C/o UC EXPRESS,	)	Robert Lopez-Cepero,
Defendant.	)	Judge Presiding.

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JUSTICE MASON delivered the judgment of the court.  
Justices Hyman and Pucinski concurred in the judgment.

**ORDER**

- ¶ 1 **Held:** Board of Review decision that plaintiff was ineligible for unemployment benefits because she was discharged for misconduct, was not clearly erroneous. Plaintiff had been twice warned for failing to check merchandise – perishable food – for expiration dates and remove soon-to-expire goods, and it was not clearly erroneous for the Board to conclude that the failure to do so that led to her discharge was conscious rather than merely inadvertent.

¶ 2 Defendants Department of Employment Security (Department) and its Director and Board of Review (Board) – collectively, the State Parties – appeal from an order of the circuit court reversing a decision by the Board finding plaintiff Ambrosina Serrano ineligible to receive benefits under the Unemployment Insurance Act (Act). 820 ILCS 405/100 *et seq.* (West 2010). The Board affirmed a Department referee's decision finding Serrano ineligible because she was dismissed from her employment as a shift manager for defendant Aldi, Inc., for misconduct: failing to check expiration dates on perishable merchandise after two prior warnings for the same conduct. On appeal, the State Parties contend that the Board's decision was not clearly erroneous.

¶ 3 Serrano filed a claim for benefits under the Act in March 2011 based on her employment by Aldi from August 2004 through March 8, 2011. Aldi filed a protest claiming that Serrano was discharged on March 8 for "having out of date product on sales floor" on March 4, specifically, ground beef and bread, so that "[h]ad a customer purchased the out of date food, the customer could have possibly gotten ill."

¶ 4 A Department claims adjudicator investigated and ruled on Serrano's claim in March 2011, finding that she was discharged because "she had been repeatedly warned of having outdated products on the shelf." However, the adjudicator found Serrano eligible for benefits because the "actions [that] resulted in her discharge did not harm" Aldi or fellow employees.

¶ 5 Aldi sought reconsideration, and a claims adjudicator found Serrano ineligible in May 2011 because "she allowed outdated products to remain on sales floor jeopardizing public health after she had been put on a final warning." Serrano sought reconsideration of the May 2011 decision, and a claims adjudicator found in June 2011 that she was eligible because her conduct "was not deliberate or willful." Aldi sought reconsideration, but in July 2011 the adjudicator again found plaintiff eligible.

¶ 6 Aldi appealed, and a Department referee held a hearing on July 29, 2011.

¶ 7 Lindsay Barton testified for Aldi that on March 4, 2011, at about 2:30 p.m., she went to the store where Serrano was shift manager. Barton found multiple loaves of bread and packages of meat that were out-of-date, in that their "sell-by" date was the previous day. Aldi's rule was that bread is taken off the sale shelves five days before its sell-by date and meat is removed one day before its sell-by date<sup>1</sup>. The shift manager "is supposed to check the dates \*\*\* the first thing at the beginning of the shift." Serrano began work on March 4 at 6 a.m. She had been trained in Aldi's policies when she was promoted to shift manager, which was "a couple of years" before the incident. Serrano had been warned twice before the incident of March 4, 2011, once in February 2011 and again on March 2, 2011.

¶ 8 Serrano testified that, on March 2, Barton requested that she work at another newly-opened Aldi store on March 3, which she did from 9 a.m. to about 1 p.m. before working at her usual store from 2 p.m. until closing. When Serrano opened her store on March 4, she usually had two cashiers to help with opening, but when she opened at 6 a.m. that day, she had only one. The meat and bread in the store are stocked in the evening by the closing shift, and in particular there was no bread on the shelves the day before the incident so that any out-of-date bread was shelved between the night of the 3<sup>rd</sup> and the morning of the 4<sup>th</sup>; that is, "the out of date product was put out there by the cashier in the evening" prior. Generally, Serrano would check the dates on the bread in the morning while the meat would be checked the previous evening. Serrano admitted that Barton had warned her about finding out-of-date bread, though she placed the last warning at a week prior to March 4, rather than March 2.

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<sup>1</sup>Thus, the bread with a sell-by date of March 3, 2011, should have been removed from the shelves by February 26, and the meat with a sell-by date of March 3, 2011, should have been removed by March 2.

¶ 9 When asked if she checked the shelves on the morning of the 4<sup>th</sup>, Serrano admitted, "I did not check. I'm going to be honest, I did not check the meat section because that is stocked every evening and the cashier knows to check the meat." When asked if she assumed that "whoever stocked the meat the night before checked for out-of-date meat," Serrano replied, "Exactly, because \*\*\* the store manager wants the meat section stocked every evening \*\*\* after closing. \*\*\* It doesn't get stocked in the morning, it gets stocked in the evening." Serrano saw "no reason to check the bread" on the morning of the 4<sup>th</sup> because there was no bread on the shelves on the night of the 3<sup>rd</sup> and she presumed that out-of-date bread would not have been delivered. When asked "who is ultimately responsible for dates on the sales floor," Serrano replied "everybody," that is, both managers and cashiers, though the ultimate responsibility "falls on the managers, of course." Serrano admitted that she "probably did slack on the 4<sup>th</sup>" but attributed it to exhaustion from working two shifts on the 3<sup>rd</sup>.

¶ 10 Barton agreed that the meat section is stocked by the evening or closing shift but noted that Serrano was the manager of the evening shift on March 3 as well as the manager of the morning shift on the 4<sup>th</sup>. Bread was delivered on the morning of the 4<sup>th</sup> and Barton did not believe that out-of-date bread would have been delivered. While the out-of-date loaves of bread that Barton found were loose, only "entire trays and cases of bread" are delivered.

¶ 11 The referee issued his decision in August 2011. He found that Aldi "requires its employees to remove meat from sale one day before its sell by date and bread five days before its sell by date" and that Serrano as shift manager "was supposed to check meat and bread at the beginning of every shift." Serrano was aware of Aldi's policy because of the two prior warnings. However, "on the day of the final incident that resulted in her discharge," although Serrano's shift began at 6 a.m., out-of-date meat and bread was found on the sale shelves at 2:30 p.m. Moreover, though Serrano had worked the previous day, the sell-by dates on the meat and bread

were the previous day. The referee concluded that these circumstances constituted misconduct, in that Serrano "violated a known and reasonable rule of the employer requiring her to check meat and bread daily to insure out of date product was removed from sale," that the prior warnings for this same offense demonstrated that her violation of the rule was "willful and deliberate," and that her violation harmed Aldi both by "impairing its relationship with its customers" if they purchased out-of-date food and by potentially incurring liability when "out of date meat could have made them ill." The referee found that the prior warnings meant that this was not "an isolated incident of missing a loaf of bread or package of meat." Having been discharged for misconduct, Serrano was found ineligible for benefits.

¶ 12 Serrano appealed to the Board. The Board affirmed the referee's decision as supported by the record and law.

¶ 13 Serrano timely filed an administrative review action in the circuit court, which reversed the Board's decision in September 2012. The State Parties timely filed a notice of appeal.

¶ 14 On appeal, the State Parties contend that the Board's decision was not clearly erroneous.

¶ 15 Section 602(A) of the Act provides that an employee is ineligible for unemployment insurance benefits when the employee is "discharged for misconduct connected with his work."

820 ILCS 405/602(A) (West 2010). Misconduct is:

"the deliberate and willful violation of a reasonable rule or policy of the employing unit, governing the individual's behavior in performance of his work, provided such violation has harmed the employing unit or other employees or has been repeated by the individual despite a warning or other explicit instruction from the employing unit." 820 ILCS 405/602(A) (West 2010).

The elements of misconduct under the Act are that: (1) the claimant deliberately and willfully violated a rule or policy of the employer, (2) the rule or policy was reasonable, and (3) the violation either harmed the employer or was repeated despite warnings. *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 29. A claimant's conduct is willful or deliberate if she is aware of but consciously disregards a rule of the employer. *Id.*, ¶ 30.

Conversely, "poor performance and carelessness standing alone would not make [a claimant] ineligible." *Alternative Staffing, Inc. v. Department of Employment Security*, 2012 IL App (1st) 113332, ¶ 35. Potential as well as actual harm may underlie misconduct. *Pesoli*, ¶ 32.

¶ 16 We review the decision of the Board, not the circuit court. *Id.*, ¶ 20. The Board is the trier of fact in cases under the Act, and its findings of fact are considered *prima facie* true and correct. *Id.* We do not reweigh the evidence or substitute our judgment for that of the Board. *Id.*, ¶ 26. The Board's decision as to whether an employee was discharged from employment for misconduct under the Act presents a mixed question of law and fact reviewed for clear error. *Id.*, ¶¶ 20, 33. The Board's decision is clearly erroneous only if, after reviewing the entire record, we definitely and firmly believe that a mistake has occurred. *Id.*, ¶ 20.

¶ 17 Here, we have no doubt that Aldi's rule regarding out-of-date merchandise is reasonable. It is also eminently reasonable – that is, far from clearly erroneous – to conclude on this evidence that Serrano's failure to check merchandise on the day in question was both repeated after warnings and had the potential for harm to Aldi as the referee described. The evidence that Serrano was previously warned to check for and remove out-of-date merchandise amply supports a conclusion that she was aware of Aldi's rule. The issue upon which the parties rightly concentrate their argument is whether her failure was willful and deliberate.

¶ 18 Serrano's explanations for her failure to adhere to Aldi's policies do not withstand scrutiny. Serrano explained that she did not check the meat on the morning of the 4<sup>th</sup> because it

is stocked by the evening or closing shift. Serrano's explanation regarding the meat does not avail her because she was also the manager on the evening of the 3<sup>rd</sup> and thus responsible for checking the meat. Further, as of March 3, meat that had a March 3 sell-by date should already have removed from the shelves the previous day. Thus, Serrano failed to check meat for two straight days, thus supporting the conclusion that her conduct was not inadvertent.

¶ 19 Serrano saw "no reason to check the bread" because the shelves were empty the night before and she assumed that the newly-delivered bread was not out-of-date. It is not clearly erroneous to conclude from this that Serrano made a conscious choice to not check the bread rather than forgetting to do so. Even if the bread was all newly-delivered as Serrano testified, we consider it reasonable for Aldi to expect her to check the dates to ensure that out-of-date bread was not delivered, an unlikely but not non-existent possibility.

¶ 20 On this record, we conclude that the Board's decision that Serrano was ineligible for benefits under the Act because she was discharged for misconduct was not clearly erroneous.

¶ 21 Accordingly, we reverse the judgment of the circuit court.

¶ 22 Reversed.